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# The Monopoly on Digital Distribution

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# The Monopoly on Digital Distribution

Michael S. Richardson\*

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*When people lack jobs, opportunity, and ownership of property they have little or no stake in their communities.<sup>1</sup>*

—Jack Kemp

## I. INTRODUCTION

Intangible digital goods should be traded under similar terms as tangible goods because without the protections given to physical property, consumers engaging in digital property transactions are at a significant disadvantage, compared to only a few decades ago.<sup>2</sup> For the past several decades, contracts of

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1. Committee Endorsed Candidates, HENRIETTA REPUBLICAN COMMITTEE CANDIDATES, <http://www.henriettarepublican.com/candidates.html> (last visited Oct. 12, 2013).

2. See generally R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. Rev. 577 (2003); see generally Dimitri Konstantas, *Trading Digital Intangible Goods: The Rules of the Game 1*, available at <http://asg.unige.ch/site/papers/KoMo00a.pdf>.

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adhesion have become the primary force in the transfer of digital property.<sup>3</sup> These are unilateral contracts between parties on a “take-it-or-leave-it-basis.”<sup>4</sup> Typical contracts of adhesion define digital property transfers as merely a license<sup>5</sup> and attempt to strip all other rights from the end user by restricting their ability to reproduce, reuse, or transfer property.<sup>6</sup> This is entirely unique and distinct from all other forms of property ownership.<sup>7</sup> For example, a traditional book may be lawfully resold without prior consent from the copyright owner and its intellectual content may be reused under the fair use doctrine, which permits limited use of the material without acquiring permission from the owner.<sup>8</sup>

However, an electronic book does not adhere to the same instruments of copyright law.<sup>9</sup> Contracts of adhesion prevent resale of the electronic book because the sold content is classified as a license; the original distributor retains ownership of the digital data and tyrannically dictates restrictive measures for the licensee.<sup>10</sup> These doctrines have grown so expansively that distributors are attempting to apply these restrictive measures to not just digital property, but physical personal property as well.<sup>11</sup> The current system of digital property transfer disenfranchises consumers and inevitably creates a monopoly on the distribution of digital materials, since only the original distributor retains the right to sell.<sup>12</sup>

The best solution to this problem is to allow the first sale doctrine to permeate the veil of contracts of adhesion when dealing with digital transactions.<sup>13</sup> The first sale doctrine allows lawful buyers to resell copyrighted materials.<sup>14</sup> Thus, in the prior example of an electronic book, allowing the first sale doctrine to break the legal confines of contracts of adhesion would create

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3. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 145 (2008).

4. *See id.* at 123.

5. *See* Christopher B. Yeh, *INTELLECTUAL PROPERTY: B. COPYRIGHT: 1. Note: Wall Data Inc. v. Los Angeles County Sheriff's Department: License Versus Sale At the Crossroads of Contract and Copyright*, 22 BERKELEY TECH. L.J. 355, 357 (2007).

6. *See* Reese, *supra* note 2, at 578.

7. *See* Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381, 392 (2005).

8. *Id.*; *Krause v. Titleserv, Inc.*, 402 F.3d 119, 122 (2d Cir. 2005). *See* *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1181 (E.D. Mo. 2004) (Court held users waived their fair use defense by accepting a contract of adhesion); *see also* Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453, 454 (2002) (arguing that fair use is still valuable even in the digital context).

9. Madison, *supra* note 7, at 392. *See also* Depoorter & Parisi, *supra* note 8, at 454.

10. *See* Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103, 1139 (2008).

11. *See* Chris Kohler, *Microsoft Will Let You Resell Xbox One Games—But Publishers May Not*, WIRED.COM, (June 6, 2013, 6:39 PM), <http://www.wired.com/gamelife/2013/06/xbox-one-used-games/>.

12. *See* Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1889 (2010).

13. *See generally* Reese, *supra* note 2.

14. *See* 17 U.S.C. § 107 (2006); *see also* Reese, *supra* note 2, at 578.

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parity in regards to the transferability between an electronic book and a physical book. Although European courts have started adopting this solution,<sup>15</sup> the United States court system is still resistant.<sup>16</sup>

This problematic legal imbalance, coupled with a consumer demand for used digital goods, has left a void that only a few companies have attempted to satisfy due to fear of copyright liability.<sup>17</sup> In 2011, the sale of digital music surpassed the sale of physical shipments (CDs and vinyls).<sup>18</sup> In an effort to recapture these digital sales, a new startup company, ReDigi, has been attempting to create a secondary used market for music files by scanning the metadata of a user's music to determine if it was acquired legally.<sup>19</sup> The program then deletes the music file and all copies from the user's computer, and transfers a copy of the file to another willing buyer at a price determined by the buyer or the seller.<sup>20</sup>

The goal of the process is to ensure only the buyer retains the sole music file after the sale.<sup>21</sup> However, since copies are inevitably created in the process,<sup>22</sup> U.S. courts are unlikely to allow first sale doctrine applicability.<sup>23</sup> The first sale doctrine needs to be introduced into digital transactions, and one way to accomplish this is by expanding property ownership to individual digital goods.<sup>24</sup>

This Comment examines the divergent relationship between contract law, copyright law, and property law when applied to tangible personal property as opposed to intangible digital property. Intangible digital property is defined as "digital representations of tangible goods."<sup>25</sup> The effect of the current state of U.S. law on digital property prevents end users from acquiring ownership of

15. See Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R. para. 10 (July 3, 2012), available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-128/11&td=ALL>.

16. See generally *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); see generally *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); see generally *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); see generally *Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907 (N.D. Ill. 2002); see generally *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002).

17. See Sarah Abelson, *An Emerging Secondary Market for Digital Music*, 29 WTR ENT. & SPORTS LAW 8, 8-9 (Winter 2012).

18. Chris C. Anderson, *RIAA 2011 Year End Shipment Data Report: Digital Sales King, Physical Sales Continue Decline*, HUFFINGTON POST (Mar. 28, 2012, 5:27 PM), [http://www.huffingtonpost.com/2012/03/28/riaa-2011-sales-data-digital\\_n\\_1386098.html](http://www.huffingtonpost.com/2012/03/28/riaa-2011-sales-data-digital_n_1386098.html).

19. Abelson, *supra* note 17, at 8-9; see also Sage Vanden Heuvel, *Fighting the First Sale Doctrine: Strategies for a Struggling Film Industry*, 18 MICH. TELECOMM. & TECH. L. REV. 661, 670 (2012).

20. Abelson *supra* note 17, at 8; see also Vanden Heuvel, *supra* note 19, at 670.

21. Abelson, *supra* note 17, at 11; see also Vanden Heuvel, *supra* note 19, at 670.

22. See *infra* Part II.

23. See generally Henry Sprott Long III, *Reconsidering the Balance of the Digital First Sale Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1184 (2008) (discussing rights afforded to consumers under the first sale doctrine with tangible media is missing with identical digital media).

24. See *infra* Parts II-V.

25. Konstantas, *supra* note 2, at 1.

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digital property due to its heavy reliance on contracts of adhesion.<sup>26</sup> As intangible digital property consumption increases in comparison to tangible property consumption, consumers will inevitably be unable to transfer digital goods because legal fictions have overwhelmed real world needs.<sup>27</sup> United States courts should treat intangible digital property with the same care tangible property has been given, by allowing the first sale doctrine to enter into digital transactions regardless of restrictive contract of adhesion terms.

Section II of this comment gives a brief history of digital property protection.<sup>28</sup> Section III of this comment will address the role contracts of adhesion play in digital transfers, along with their strengths and weaknesses.<sup>29</sup> Overall, the court's repeated acquiescence to modern contracts of adhesion prevents end user protection.<sup>30</sup> For example, the first sale doctrine has become inaccessible to consumers and allows distributors of digital property to impose "take-it-or-leave-it"<sup>31</sup> contractual terms creating a monopoly on digital goods.<sup>32</sup>

Section IV of this comment identifies the balancing role that the first sale doctrine plays in other property aspects, and additionally argues that the first sale doctrine should play a vital role in future transfers of digital goods.<sup>33</sup> Section V of this comment illustrates the European attempt to apply the first sale doctrine in digital transfers and the need for United States courts to join the same rationale.<sup>34</sup> Failure to do so erodes the Anglo-American legal tradition of ownership of property by the legal fiction of contracts of adhesion.<sup>35</sup> Thus, intangible digital goods should be traded under similar terms as tangible goods because without the protections of physical property, consumers engaging in digital property transactions are at a significant disadvantage.<sup>36</sup>

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26. See generally Carver, *supra* note 12 (illustrating the problem with allowing copyright owners to use end user licenses).

27. Glenn Peoples, *Digital Sales Up 10% Over January 2012*, BILLBOARD (Jan. 31, 2013, 7:00 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1536343/digital-sales-up-10-over-january-2012> (discussing the continued increase in digital music sales); see Brenna Hillier, *NPD: Digital sales up 17%, not enough to reverse industry decline*, VG24/7 (Aug. 8, 2012, 11:44 PM), <http://www.vg247.com/2012/08/08/npd-digital-sales-up-17-not-enough-to-reverse-industry-decline/> (steady increase in digital video game sales).

28. See *infra* Part II.

29. See *infra* Parts III.A-B.

30. See *infra* Parts III.A-B.

31. Zhang, *supra* note 3, at 123.

32. See Carver, *supra* note 12, at 1889 (arguing potential monopoly issues when copy owners use end user licenses).

33. See *infra* Parts IV.A-C.

34. See *infra* Parts V.A-B.

35. See *infra* Part IV.A.

36. See *infra* Parts II-VI.

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## II. DIGITAL PROPERTY HISTORY

Currently, the law allows tangible personal property the protections of the first sale doctrine, while the same content in intangible digital form is stripped of these rights.<sup>37</sup> This disparity emerged because historically, digital products have not been seen under property law as “things” like books, machines, or other tangible items.<sup>38</sup>

In U.S. criminal law, digital property is not included in crimes such as larceny because it is not a “material object or movement of power” and thus did not fulfill the rigid definition of property.<sup>39</sup> Instead of widening the scope of property law to encompass intangible digital property, federal legislatures enacted new and distinct legislation to protect digital mediums from theft, trespass, and other virtual crimes.<sup>40</sup> This shift led to the current laws regulating digital property, which prevent transferability of digital goods through the use of contracts of adhesion<sup>41</sup> and fall short of the accepted norms of tangible property.<sup>42</sup>

The 21st century has seen a massive transfer of traditional physical mediums such as books, music, and entertainment converted into completely digital forms.<sup>43</sup> This presents many challenges for owners to display first sale doctrine defenses because unintended copies are inevitably being created.<sup>44</sup> “[A] user’s

37. See *infra* Parts III-IV.

38. Madison, *supra* note 7, at 462.

39. Moonho Song & Carrie Leonetti, *The Protection of Digital Information and Prevention of its Unauthorized Access and Use in Criminal Law*, 28 J. MARSHALL J. COMPUTER & INFO. L. 523, 526 (2011). See generally Susan W. Brenner, *Nanocrime?*, 2011 U. ILL. J.L. TECH. & POL’Y 39, 71 (2011) (discussing the complexities of rigid definitions of property crimes which cannot easily adapt to rapid changes in technological advancements).

40. Song & Leonetti, *supra* note 39, at 523-24; see also ALA. CODE § 13A-8-1(10) (1994) (intangible property included in definition of property); see also ARIZ. REV. STAT. ANN. § 13-1801(A)(12) (2001) (“[p]roperty” means anything of value, tangible or intangible, including trade secrets.”); see also ARK. CODE ANN. § 5-36-101(7) (2003); see also FLA. STAT. ANN. § 812.012(4)(b) (West 2005); see also ME. REV. STAT. ANN. tit. 17-A, § 352(1)(B) (1983); see also MO. ANN. STAT. §§ 556.063(13), 570.010(10) (West 2012); see also MONT. CODE ANN. § 45-2-101(61)(k) (West 2003); NEB. REV. STAT. ANN. § 28-509(5) (West 1995); see also N.H. REV. STAT. ANN. § 637:2(I) (1996); see also N.J. STAT. ANN. § 2C:20-1(g) (West 2004); see also N.M. STAT. ANN. § 30-1-12(F) (West 2004); see also OR. REV. STAT. ANN. § 164.005(5) (West 2003); see also tit. 18 PA. CONS. STAT. ANN. § 3901 (West 2007); see also S.D. CODIFIED LAWS § 22-1-2(35) (2003); see also TENN. CODE ANN. § 39-11-106(a)(28) (West 2003); see also TEX. PENAL CODE ANN. § 31.01(5)(B) (West 2004-2005); see also UTAH CODE ANN. § 76-6-401(1) (West 2003); see also WYO. STAT. ANN. § 6-1-104(a)(viii) (2003) (defining property as anything of value as opposed to a material object). See generally Marc D. Goodman & Susan W. Brenner, *The Emerging Consensus on Criminal Conduct in Cyberspace*, 6 UCLA J.L. & TECH. 1 (2002).

41. See Carver, *supra* note 12, at 1915 (explaining the Economic Realities Approach and Perpetual Possession Approach).

42. See Song & Leonetti, *supra* note 39, at 525.

43. Sulin Ba et al., *Small Companies in the Digital Economy*, in UNDERSTANDING THE DIGITAL ECONOMY: DATA, TOOLS, AND RESEARCH 185, 187 (Erik Brynjolfsson & Brian Kahin eds., 2002). See *Consumers are Buying Digital Goods in New Ways*, INTERNET RETAILER (May 28, 2010, 2:04 PM), <http://www.internetretailer.com/2010/05/28/consumers-are-buying-digital-goods-new-ways>.

44. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1109 (9th Cir. 2010).

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computer will automatically copy software into the computer's random access memory ('RAM'), which is a form of data storage."<sup>45</sup>

Simply uploading or downloading can make multiple copies.<sup>46</sup> For example, items required for the user to perceive and interact with the file when downloading such as, modems, routers, web browsers, video decompression chips, and display boards all create unintended copies as the computer manipulates the electronic signal of the file and converts it into a visual representation on a computer screen.<sup>47</sup> This is why Congress enacted the essential step defense<sup>48</sup> to allow software users who are "owner[s] of a copy" of a software program to make these copies that inevitably occur via tasks required to run the software, such as installation.<sup>49</sup> Yet, Congress has not acted to allow users the ability to become owners of the software, which is a necessary requirement to use the first sale doctrine.<sup>50</sup> As a result, consumers of these digital medium have lost protections once afforded to them under traditional physical mediums<sup>51</sup> and have undue copyright liability placed upon them.<sup>52</sup>

Previously, physical mediums, such as a book, had three doctrines regulating its use and sale.<sup>53</sup> First, common law property rights instilled ownership upon the rightful buyer's personal property.<sup>54</sup> Second, copyright law protected the original creator of the work by preventing use or copy of the intellectual properties contained within the book.<sup>55</sup> Finally, the first sale doctrine allowed resale of the book by the buyer even though it was copyrighted.<sup>56</sup>

Yet, since property is limited to a "material object or movement of power," electronic symbols created via a computer are not considered property.<sup>57</sup> Thus, when one constructs a document on the computer, they own only the intangible copyright associated with that work of authorship and have no common law property rights in the digital file, only a copyright to the file.<sup>58</sup> However, when

45. *Id.*

46. Mark A. Lemley, *Copyright Owners' Rights and Users' Privileges on the Internet: Dealing with Overlapping Copyrights on the Internet*, 22 DAYTON L. REV. 547, 555 (1997).

47. *Id.*

48. 17 U.S.C.A. § 117 (1998).

49. *Vernor*, 621 F.3d at 1109.

50. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir.1993) (customers were licensees who were not entitled to claim the essential step defense). *See Triad Sys. Corp v. Se. Exp. Co.*, 64 F.3d 1330 (9th Cir. 1995). *See Reese*, *supra* note 2, at 578 (mentioning the "wait and see approach" taken by Congress).

51. *See Reese*, *supra* note 2, at 610-15 (discussing digital networks and technological protection measures).

52. Lemley, *supra* note 46, at 555; Alfred C. Yen, *Entrepreneurship, Copyright, and Personal Home Pages*, 75 OR. L. REV. 331, 333-34 (1996).

53. *See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 348-49 (1908).

54. *Madison*, *supra* note 7, at 392; *see also Depoorter & Parisi*, *supra* note 8, at 454.

55. *See generally Eldred v. Ashcroft*, 537 U.S. 186 (2003).

56. *Reese*, *supra* note 2, at 577.

57. *Song & Leonetti*, *supra* note 39, at 526.

58. *See Adobe Sys. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051, 1055 (N.D. Cal. 2002).

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compared with someone who wrote the same document on a piece of paper, this author owns the copyright attributed to that work of authorship and has common law property rights in the paper itself.<sup>59</sup> This result gives the digital author tremendous power because the supply of his work will be smaller in the digital realm, since his work can never be resold or transferred under the first sale doctrine.<sup>60</sup> This creates a situation in which the intangible buyer is at a tremendous disadvantage because there is no secondary market to drive prices down.<sup>61</sup>

Even if the digital file was considered tangible property, contracts of adhesion typically prevent ownership of an electronic book by classifying it as a lease, which precludes the first sale doctrine because the buyer does not actually own anything.<sup>62</sup> In order to gain parity between digital goods and tangible goods, the first sale doctrine, along with digital ownership and bars to restraints of alienation of digital property, are necessary.

Without the protections of physical property, consumers engaging in digital property transactions are at a significant disadvantage when compared to a few decades earlier.<sup>63</sup> Intangible digital goods can and should be traded under similar terms as tangible goods.<sup>64</sup>

### III. CONTRACTS OF ADHESION

In order to transfer intangible digital property, consumers must overcome the use of standard license terms commonly referred to as contracts of adhesion, which restrict the transfer of digital property.<sup>65</sup> This can be accomplished by allowing the first sale doctrine to overwrite any restriction on transferability.<sup>66</sup> Almost all exchanges of digital property are accompanied by a contract of adhesion in the form of an end user license agreement.<sup>67</sup> A contract of adhesion is a contract between two parties where the terms and conditions of the contract are set by one party, and the other party is placed in a “take-it-or-leave-it” position with little or no ability to negotiate more favorable terms.<sup>68</sup> Traditional contracts

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59. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908).

60. Reese, *supra* note 2, at 578.

61. *Id.* at 625-26.

62. See *Adobe Sys.*, 216 F. Supp. 2d at 1052 (providing an example of the buyer owning the CD-ROM but not the software because of an agreement).

63. Reese, *supra* note 2, at 610, 612.

64. Konstantas, *supra* note 2, at 9-10.

65. Zhang, *supra* note 3, at 146.

66. See generally Reese, *supra* note 2.

67. Michael E. Kenneally, *Commandeering Copyright*, 87 NOTRE DAME L. REV. 1179, 1180 (2012).

68. Zhang, *supra* note 3, at 124-25.



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require a multilateral meeting of the minds between parties, whereas an adhesion contract can infer assent to unilateral terms.<sup>69</sup>

Courts have grappled heavily with enforcing contracts of adhesion due to unfairness among the negotiating parties.<sup>70</sup> Overall, most U.S. courts reject claims that a party lacked assent by failing to read the terms<sup>71</sup> and have found that the role of contracts of adhesion in promoting economic efficiency and reducing transaction costs outweighs the potential for inefficient and unjust terms.<sup>72</sup>

Three distinct but legally similar contracts of adhesion have arisen: shrink-wrap, click-wrap, and browse wrap agreements.<sup>73</sup> Shrink-wrap agreements are typically imposed in the retail of physical software packages containing written license agreements that become effective as soon as the customer removes the wrapping from the package.<sup>74</sup> Click-wrap agreements usually dictate E-commerce transactions on the internet by which a party may assent by clicking “I agree” or typing a specified set of words.<sup>75</sup> Browse-wrap agreements are electronic form agreements provided on a website where users can examine the terms without expressly agreeing to them.<sup>76</sup> Even though the party has not assented by clicking “I agree,” the user’s assent is assumed in browse-wrap agreements when the user performs certain actions such as software installation.<sup>77</sup> Today, users agree to multiple types of contracts of adhesion on an almost daily basis.<sup>78</sup>

69. *See id.* at 123.

70. Courts that have found these types of licenses invalid characterize them as contracts of adhesion that are unacceptable. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000). However, other courts have held that these types of licenses are valid and enforceable contracts. *See generally ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Hill*, 105 F.3d 1147; *see generally Mudd-Lyman Sales & Serv. Corp. v. United Parcel Serv., Inc.*, 236 F. Supp. 2d 907, 911-12 (N.D. Ill. 2002); *see generally I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002).

71. *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981); *Schillachi v. Flying Dutchman Motorcycle Club*, 751 F. Supp. 1169, 1175 (E.D. Pa. 1990) (quoting 8 PENNSYLVANIA LAW ENCYCLOPEDIA § 83: “[i]t is common sense and an accepted rule of law that a person has a duty to read the contract before executing it, and his failure to do so will not excuse his ignorance of the contents.”). *See Univ. of Miami v. Intuitive Surgical, Inc.*, 166 F.App’x 450, 453 (11th Cir. 2006) (failing to read the contract is no excuse); *see also Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 869 (D. Or. 2002) (explaining that consumers do have a responsibility to read their contracts and a mere failure to read is not a valid defense to contract formation).

72. *Meridian Project Sys. v. Hardin Constr. Co., LLC*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006); *see also ProCD*, 86 F.3d at 1451.

73. Zhang, *supra* note 3, at 125-26.

74. *Id.* at 126; *see also ProCD*, 86 F.3d at 1449.

75. Zhang, *supra* note 3, at 124-25; *see also Christina L. Kunz et al., Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2001); *see also Cheryl B. Preston & Eli W. McCann, Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 17-18 (2011).

76. Kunz et al., *supra* note 75, at 401.

77. Zhang, *supra* note 3, at 125-26; *see also Preston & McCann, supra* note 75, at 18.

78. Kenneally, *supra* note 67, at 1180.

*Global Business & Development Law Journal / Vol. 27**A. Benefits of Contracts of Adhesion*

Proponents for contracts of adhesion stress their ability to attain market efficiency.<sup>79</sup> The theory relies upon the assumption that quick contracts and loose requirements directly promote economic efficiency because they reduce transaction costs between parties.<sup>80</sup> As a result, courts refrain from putting pressure on contract drafters to produce balanced contractual terms among the parties because, in a competitive market, consumers can pay more for better terms.<sup>81</sup>

Under this theory, sellers have little incentive to take advantage of the buyer because they risk lowering their reputation.<sup>82</sup> In addition, the buyer does not incur the risk of reputation loss because, in a competitive market, the buyer can seek other available distributors.<sup>83</sup> As a result, the appearance of one-sided terms may not be one-sided after all.<sup>84</sup> The seller's reputational considerations and disinclinations to sue consumers are a significant cost for the seller and, as a result, the seller behaves in the consumer's best interests.<sup>85</sup>

Another rationale is that competitive markets force sellers to accommodate buyers.<sup>86</sup> Competitive markets allow contracts of adhesion to afford better terms to buyers because sellers can charge a higher price for the more favorable terms.<sup>87</sup> However, in many situations, digital goods are equal to or more expensive than their physical counterparts.<sup>88</sup> Despite lower production, manufacturing, shipping, and marketing costs, the cost of entertainment has not gone down in the past thirty years.<sup>89</sup> In addition, Apple was found violating the Sherman Antitrust Act by fixing prices of its Ebooks at unlawfully high prices in order to increase revenue.<sup>90</sup> These actions are clearly contradictory to what is in the best interests

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79. See Preston & McCann, *supra* note 75, at 12.

80. *Id.*

81. *Id.*

82. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006).

83. See generally *id.*

84. See generally Bebchuk & Posner, *supra* note 82.

85. *Id.*

86. See *id.* at 830.

87. *Id.* at 833.

88. *E-Book Readers Face Sticker Shock*, THE WALL ST. J. (Dec. 15, 2011, 1:08 PM), [http://online.wsj.com/article\\_email/SB10001424052970204336104577096762173802678-IMyQjAxMTAxMDEwNTExNDUyWj.html?mod=e2tw#articleTabs%3Darticle](http://online.wsj.com/article_email/SB10001424052970204336104577096762173802678-IMyQjAxMTAxMDEwNTExNDUyWj.html?mod=e2tw#articleTabs%3Darticle).

89. Scott Monkman, *Corporate Erosion of Fair Use: Global Copyright Law Regarding File Sharing*, 6 ASPER REV. INT'L BUS & TRADE L. 265, 280 (2006).

90. *United States v. Apple Inc.*, No. 12 Civ. 2826, 2013 WL 3454986, at 59 (S.D.N.Y. July 10, 2013) (ruling that Apple conspired to restrain trade by fixing prices in violation of Section of the Sherman Antitrust Act).

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of the consumer and, without other methods to lower the price, such as secondary markets, the consumer has no option but to accept these inflated prices.<sup>91</sup>

### B. *Drawbacks of Contracts of Adhesion*

The major flaw with using reputational considerations as a basis for party equality is that consumers are ill-informed about the behavior of sellers.<sup>92</sup> The burden of becoming informed and digesting the lengthy and cumbersome legalese of online contracts of adhesion is a significant cost imposed upon the consumer.<sup>93</sup> As a result, buyers engage in rational ignorance because the cost of acquiring full knowledge is outweighed by the desire to complete the transaction promptly.<sup>94</sup> Since consumers are ill-informed about sellers, sellers rarely incur reputational costs and can take advantage of the consumer via unfair contractual terms restricting use and transfer.<sup>95</sup>

Even more troubling, many contracts that attempt to assert legal rights on behalf of the distributor frequently contain outright misrepresentations.<sup>96</sup> For example, various publishers require permission and compensation for the works of William Shakespeare, Henry David Thoreau's "Walden" (1854), Charles Darwin's "The Expression of the Emotions of Man and Animals" (1872), or Jane Austen's "Sense and Sensibility" (1811).<sup>97</sup> These works are without a doubt in the public domain and require no permissions to recreate.<sup>98</sup> Distributors engage in these actions to discourage economic competition, resulting in increased costs and restrictions on legitimate fair use rights.<sup>99</sup>

Many terms in contracts of adhesion are in fact unfair, onerous, and overreaching, but are nonetheless allowed by courts because they do not reach the standard of unconscionability.<sup>100</sup> Unconscionability can be satisfied by a

91. See generally Dan Moren, *The Apple Ebook Price-Fixing Suit: What it All Means*, MACWORLD (June 3, 2013, 11:00 AM), <http://www.macworld.com/article/2040598/the-apple-ebook-price-fixing-suit-what-it-all-means.html>.

92. Bebchuk & Posner, *supra* note 82, at 832.

93. See *id.*

94. See *id.*

95. See *id.* at 830, 832.

96. John Tehranian, *Curbing Copyblight*, 14 VAND. J. ENT. & TECH. L. 993, 994-95 (2012); see also Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1076 (2006).

97. Tehranian, *supra* note 96, at 1003.

98. See Peter B. Hirtle, *Recent Changes To The Copyright Law: Copyright Term Extension*, ARCHIVAL OUTLOOK (Jan./Feb. 1999), available at <http://copyright.cornell.edu/resources/publicdomain.cfm>.

99. See Tehranian, *supra* note 96, at 995.

100. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605 (reasoning that unconscionability is not determined on its face but rather alongside an inquiry into the circumstances under which a contract was executed). See generally Bebchuk & Posner, *supra* note 82, at 829. But see *Galligan v. Arovitch*, 219 A.2d 463, 465 (Pa. 1966) (finding a contract of adhesion unconscionable for unfair bargaining); but see also *Sosa v. Paulos*, 924 P.2d 357, 364 (Utah 1996) (finding a contract of adhesion unconscionable for unfair bargaining); but see also *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 284-85 (W. Va. 2002) (finding a contract of

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showing of substantively “overly harsh or one-sided results” and procedural oppression through unequal bargaining or “surprise through hidden terms.”<sup>101</sup> Of particular concern are terms that restrict transferability in regards to rights of survivorship.<sup>102</sup> One example is restrictions that grant online service providers the right to permanently delete accounts that breach a term of service, which in the process deletes all associated documents and correspondence.<sup>103</sup> Many users do not want information about banking accounts, business transactions, reservations, schedules, or similar critical information being deleted under the sole discretion of another.<sup>104</sup> Similarly, many may be shocked to discover that upon the death of a spouse, partner, or employer, a service provider can delete or withhold all content created by the decedent.<sup>105</sup> Copyright law would be of no avail because it does not include a right to prevent the destruction of a copy lawfully obtained; only common law property rights could protect the user.<sup>106</sup>

## IV. THE FIRST SALE DOCTRINE

The first sale doctrine in U.S. copyright law limits the exclusive right of the copyright owner to distribute copies of the copyrighted work by allowing those who buy copies of copyrighted works to resell those copies.<sup>107</sup> The first sale doctrine is a doctrine in copyright law that harkens back to the law’s historic disfavor of restraints on the alienation of personal property.<sup>108</sup> As a result, one who owns a copy of a copyrighted work may resell the copy or give it away.<sup>109</sup> However, the first sale doctrine is unavailable to digital property consumers

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adhesion unconscionable for unfair bargaining); *but see also* *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 430 A.2d 638, 640 (N.H. 1981) (finding a contract of adhesion unconscionable for unfair bargaining).

101. *Bragg*, 487 F. Supp. 2d at 605.

102. *See* Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 796 (2012).

103. *Preston & McCann*, *supra* note 75, at 12.

104. *Id.*

105. *See* James D. Lamm, *Digital Property: Planning for Incapacity and Death*, GRAY PLANT MOOTY 4 (June 7, 2010), available at [http://www.gpmlaw.com/uploadedFiles/Resources/Articles/Digital\\_Property\\_Planning\\_for\\_Incapacity\\_and\\_Death.pdf](http://www.gpmlaw.com/uploadedFiles/Resources/Articles/Digital_Property_Planning_for_Incapacity_and_Death.pdf). *See generally*, e.g., Brandon Giggs, *Can Bruce Willis leave his iTunes music to his kids?*, CNN (Sept. 4, 2012, 5:34 AM), [http://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html?hpt=hp\\_c2](http://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html?hpt=hp_c2) (asserting that famous actor Bruce Willis was not able to bequeath his songs on iTunes because when he purchased the music, he agreed to iTunes’ terms not to do so); *see generally*, e.g., Becky Yerak, *Online Accounts After Death: Remember Digital Property When Listing Assets*, CHICAGO TRIBUNE (Aug. 26, 2012), [http://articles.chicagotribune.com/2012-08-26/business/ct-biz-0826-digital-assets—20120826\\_1\\_online-accounts-digital-assets-digital-property](http://articles.chicagotribune.com/2012-08-26/business/ct-biz-0826-digital-assets—20120826_1_online-accounts-digital-assets-digital-property) (identifying that Yahoo’s terms of service does not allow a right of survivorship or transferability in regard to its user’s account).

106. *See* Tarney, *supra* note 102, at 784.

107. *See* 17 U.S.C. § 107 (2006); Reese, *supra* note 2, at 580-81.

108. Reese, *supra* note 2, at 580-81.

109. *Id.*

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because contracts of adhesion limit the exchange to a lease, precluding ownership of the digital property.<sup>110</sup>

### A. Real Property

The right to transfer property, specifically real property, is a cornerstone of the U.S. legal system.<sup>111</sup> Even though the first sale doctrine does not apply to real property, there lies a historic disfavor toward restraints on alienability within real property transactions.<sup>112</sup> The U.S. property system specifically rejects feudalism, which restricted real property ownership, as a way of life.<sup>113</sup> This rejection of feudalism is illustrated in common law doctrines restricting the restraint on alienation of property in favor of more efficient, free market methods of property allocation.<sup>114</sup>

Ownership under feudalism was hierarchical rather than dispersed among equal persons.<sup>115</sup> No one was a true “owner” except the King.<sup>116</sup> Lords had the power to control the terms on which others were allowed access to the lords’ lands.<sup>117</sup> Today, landlords still exist, but their powers over tenants are more limited.<sup>118</sup> For example, landlords cannot force tenants to engage in actions against the tenant’s will or restrict access from the tenants.<sup>119</sup> In a way, the relationships between online digital distributors and users mentioned above resemble a feudalistic landlord-tenant relationship.<sup>120</sup>

“A necessary consequence of . . . a democratic way of life is that . . . some contractual terms must be outlawed and placed out of bounds.”<sup>121</sup> Unfortunately, the current state of digital property transfer echoes the feudalistic approach to property rights.<sup>122</sup> Until contractual terms regulating all digital property transfers

110. See *infra* Part IV.C.

111. JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 27 (1st ed. 2009).

112. See Kim, *supra* note 10, at 1111. See generally Joseph William Singer, *Property Law as the Infrastructure of Democracy: The Fourth Wolf Family Lecture on the American Law of Real Property* (2011), available at <http://isites.harvard.edu/fs/docs/icb.topic150416.files/ID.pdf>.

113. Singer, *supra* note 112, at 6.

114. See, e.g., Reese, *supra* note 2, at 595.

115. Singer, *supra* note 112, at 3.

116. See *id.*

117. *Id.*

118. *Id.*

119. See *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (court ruled that real property owners are not entitled to prevent service workers funded by the federal government from getting access to workers living on the owner’s land).

120. See *supra* Part II.

121. Singer, *supra* note 112, at 6 (2011). See generally Brief of Appellant, *Vernon v. Autodesk, Inc.*, No. 09-35969 (9th Cir. Feb. 26, 2010), 2010 WL 894738 (claiming the first sale doctrine serves a critical democratic value by striking a balance with copyright law).

122. See Reese, *supra* note 2, at 610-12.

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as leases are reexamined, the feudalistic state of affairs will persist among digital property.<sup>123</sup> As digital transactions continue to increase, it will become more apparent that digital goods should be treated similarly to tangible goods.<sup>124</sup> Even today, the line between physical real property and digital real property is blurring<sup>125</sup> and the first sale doctrine would allow consumers to escape the pitfalls of a feudalistic digital era.<sup>126</sup>

*B. Personal Property*

Personal property is afforded more protection than digital property under the law.<sup>127</sup> Tangible personal property includes all tangible movable property.<sup>128</sup> Intangible personal property includes shares of stocks and intellectual property such as copyrights, patents, and trademarks.<sup>129</sup> The main issue in determining a valid transfer of personal property under the first sale doctrine is whether the transferee lawfully attained ownership.<sup>130</sup>

United States courts have had many conflicts between the first sale doctrine and contracts of adhesion.<sup>131</sup> One such instance involved a company sending promotional CDs of its copyrighted songs to music industry insiders to advertise and promote sales.<sup>132</sup> The promotional CDs' label stated:

This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.<sup>133</sup>

The music company intended this to be a shrink-wrap agreement in which the music insiders could have declined assent by returning the CDs.<sup>134</sup> As a result, the music company sued Troy Augusto for violating the terms of the agreement when he sold physical copies of the CDs acquired from music industry insiders.<sup>135</sup>

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123. *See generally id.*

124. *See supra* Part I.

125. *See Bragg*, 487 F. Supp. 2d at 596-97 (Plaintiff contended that operators of the game Second Life unlawfully confiscated plaintiff's virtual property and denied access to his property).

126. *See infra* Part IV.

127. *See supra* Part I.

128. *See, e.g.,* SPRANKLING & COLETTA, *supra* note 111, at 161.

129. *Id.* at 236.

130. *See supra* Part I.

131. *See Meridian Project Sys.*, 426 F. Supp. 2d at 1106.

132. *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1058, 1062 (C.D. Cal. 2008).

133. *Id.* at 1058.

134. *See id.*

135. *See id.*

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However, the court held that this type of transaction should be categorized as a gift or sale, and not as a license.<sup>136</sup> The categorization as a sale is important because the court abandoned the contract of adhesion language categorizing the transaction as a “license.”<sup>137</sup> This afforded the industry insiders protection under the first sale doctrine because the sale classification meant that a transfer of ownership had occurred.<sup>138</sup>

#### C. *Digital Property*

“Only those who are ‘owners’ of a copy” are able to exercise the rights of transfer under the first sale doctrine.<sup>139</sup> Due to the invasiveness of contracts of adhesion throughout digital property transfers,<sup>140</sup> copyright owners’ ability to restrict a transfer is only limited “by the imaginativeness of their end-user license agreements (‘EULAs’).”<sup>141</sup>

The invasiveness of EULAs, as a form of click-wrap contracts, illustrates the law’s divergent and discriminatory approach to digital property in comparison to other forms of property.<sup>142</sup> One such EULA agreement involved Adobe, a software development and publishing company, selling educational versions of its software for students and educators at a discount.<sup>143</sup> Even though the software was contained on a CD-ROM, the court determined that the consumer ultimately paid for “the software contained on the CD-ROM, rather than the CD-ROM itself,” thus making it a transfer of intangible digital property.<sup>144</sup> The defendant distributor claimed “it was the rightful owner of the software products and therefore did not infringe” the software maker’s copyright by digitally “reselling those products, pursuant to the first sale doctrine.”<sup>145</sup> The court held that the end user license agreement<sup>146</sup> contained numerous restrictions on title that were imposed on the reseller, which limited the reseller’s ability to re-distribute the

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136. *Id.* at 1061-62.

137. *See id.* at 1064.

138. *UMG Recordings*, 558 F. Supp. 2d at 1064.

139. Carver, *supra* note 12, at 1889.

140. *See Zhang*, *supra* note 3, at 146 (reporting that today, the great majority of contracts are standard form contracts, especially in consumer, business and electronic transactions).

141. Carver, *supra* note 12, at 1889.

142. *See id.* at 1896-97 (arguing that in cases of software sales, unlike tangible property sales, too many courts incorrectly rely only on the language of the agreement to hold that the recipient possesses a “license” even if the software had been permanently transferred to the recipient).

143. *Adobe Sys.*, 216 F. Supp. 2d at 1052.

144. *Id.* at 1055.

145. *Id.* at 1053.

146. *Id.* at 1059 (the EULA stated: “THIS IS A CONTRACT. BY OPENING THIS PACKAGE YOU ACCEPT ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT . . . This package contains software (‘Software’) and related explanatory written materials (‘Documentation’) . . . Adobe grants to you a nonexclusive license to use the Software and Documentation, provided that you agree to the following . . . The Software is *owned* by Adobe and its suppliers.”).

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software, and thereby conferred a license between the software maker and the reseller.<sup>147</sup>

The *Adobe Systems* case is strikingly similar to *UMG Recordings* in that a contract of adhesion preventing resale was in place and the defendants violated that clause, yet the cases reached two completely different outcomes in the user's ability to transfer.<sup>148</sup> By comparing *UMG* and *Adobe*, it is quite clear that the primary distinction to determine whether contracts of adhesion or the first sale doctrine should control is whether the property is classified as tangible personal property or intangible digital property.<sup>149</sup> *UMG Recordings* specifically dealt with a physical CD being exchanged, whereas *Adobe Systems* only examined the intangible digital software.<sup>150</sup>

*Vernor v. Autodesk, Inc.* expands the holding in *UMG Recordings* to apply to everyday office sales.<sup>151</sup> Vernor bought copies of Autodesk, a form of computer design software, at an office sale and listed four copies on eBay for sale.<sup>152</sup> When Autodesk petitioned eBay to remove the sales, Vernor sought a declaratory judgment to establish that the sale of the software was protected by the first sale doctrine and did not infringe Autodesk's copyright.<sup>153</sup> The court considered three factors: (1) whether the copyright owner specified the software as a license, (2) whether the copyright owner significantly restricted the user's ability to transfer, and (3) whether the copyright owner restricted the user's ability to transfer the software.<sup>154</sup> The court reluctantly concluded that Vernor was not an owner of the software, noting that Congress is free "to modify the first sale doctrine and the essential step defense if it deems these or other policy considerations to require a different approach."<sup>155</sup> As a result, tangible personal property receives first sale protection, whereas intangible digital property receives no protection under the federal court system.<sup>156</sup>

## V. ALTERNATIVE TO THE CURRENT DIGITAL PROPERTY SYSTEM

The current law surrounding the transfer of digital property relies heavily upon contracts of adhesion.<sup>157</sup> This allows many benefits such as efficiency

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147. *Id.* at 1060.

148. Compare *id.*, with *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1055 (C.D. Cal. 2008).

149. Compare *Adobe Sys.*, 216 F. Supp. 2d at 1060, with *UMG Recordings*, 558 F. Supp. 2d at 1064.

150. *UMG Recordings*, 558 F. Supp. 2d at 1064; *Adobe Sys.*, 216 F. Supp. 2d at 1055.

151. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1105, 1111 (9<sup>th</sup> Circuit 2010).

152. *Id.* at 1105.

153. *Id.* at 1106.

154. *Id.* at 1110-11.

155. *Id.* at 1115.

156. See *supra* Parts IV.B-C.

157. See Zhang, *supra* note 3, at 145 (reporting that today, the great majority of contracts are standard form contracts, especially in consumer, business, and electronic transactions).



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among the parties.<sup>158</sup> However, as stated above, the current effect of the system prevents the spread and disbursement of digital property by eliminating secondary markets.<sup>159</sup> The American property system's historic disfavor of restrictions on alienability and its overall desire to make property accessible to the masses outweighs the perceived efficiency of the current system.<sup>160</sup> For these reasons, the following section will offer an avenue for the courts to take in order to establish a fair and equitable system of digital property ownership and transfer.

### *A. European Court of Justice*

A more equitable and efficient alternative to the current digital property transfer system can be found in decisions by the European Court of Justice ("ECJ").<sup>161</sup> The ECJ has ruled that the right of software developers to control distribution of a specific piece of software is exhausted once the software developer has been paid.<sup>162</sup> According to the court, it makes no difference whether the copy of the computer program was made available by means of a download or on a DVD/CD-ROM.<sup>163</sup> In addition, the software developer cannot prohibit distribution of second-hand sale.<sup>164</sup> Such distribution may not be prohibited by contract, in particular by using EULAs.<sup>165</sup>

However, the ECJ made it clear that an original acquirer of a tangible or intangible copy of a computer program, for which the copyright holder's right of distribution is exhausted, must make the copy downloaded onto his own computer unusable at the time of resale.<sup>166</sup> If the digital good continued to be in use, it would infringe the copyright holder's exclusive right to reproduce the computer program.<sup>167</sup> In contrast to the exclusive right of distribution, the exclusive right of reproduction is not exhausted by the first sale doctrine.<sup>168</sup> In this context, the ECJ also pointed out that the copyright holder may use technical protective measures, such as product keys, in order to make sure that the original acquirer of the software in fact makes the copy unusable.<sup>169</sup> The decision may allow the Redigi<sup>170</sup> business model to take root in the European market.<sup>171</sup> In

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158. *Id.* at 124. *See supra* Parts III.A-B.

159. *See supra* Parts IV.A-C.

160. SPRANKLING & COLETTA, *supra* note 111, at 27. *See Singer, supra* note 112, at 3, 7-9.

161. *See generally* Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 E.C.R. (July 3, 2012), available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-128/11&td=ALL>.

162. *Id.* at para. 72.

163. *Id.* at paras. 75, 79.

164. *Id.* at paras. 76-77.

165. *Id.* at paras. 76-77.

166. *See id.* at paras. 70, 78.

167. *UsedSoft GmbH*, 2012 E.C.R. at para. 70.

168. *Id.* at para. 73.

169. *Id.* at para. 79.

170. Abelson, *supra* note 17, at 8-9.

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effect, this decision restores balance between the seller and buyer because it allows the first sale doctrine to reenter the legal landscape by allowing digital works to be traded regardless of inadvertent copying.<sup>172</sup> Implementation of this model could be accomplished with ease in courts in the United States.<sup>173</sup>

Courts in the U.S. can escape the problems of the current system by adopting a modified multi-factor test pioneered by the ECJ, which balances the interests of the distributor and consumer equally.<sup>174</sup> When a transaction involves a completely digital or intangible good, the court should ask whether a transfer of ownership has occurred by examining the type of product being sold (service versus good), the type of payment structure (one-time payment versus continued payments), and the length of use (indefinite versus temporary), while disregarding contract language stating ownership or lease.<sup>175</sup> The United States Supreme Court has ruled that anticipatory arrangements via contract could not escape and change the actualities of what has occurred.<sup>176</sup> Likewise, U.S. courts should be less deferential to the terms of the transaction and analyze what type of transfer has actually occurred.<sup>177</sup>

Returning to the electronic book example, if a publisher sold a book to a student at a one-time fee for an indefinite period of time, the transaction would be categorized as a sale conferring ownership regardless of contract language stating otherwise.<sup>178</sup> Similarly, the ECJ's test allows this same result if the only difference in the transaction is that the sold book is downloaded or emailed instead of purchased in physical form.<sup>179</sup> As a result, the student would be able to transfer that copy of the book to another student so long as all control of the book in possession is relinquished to only that one other student.<sup>180</sup> This allows complete parity between digital transactions and tangible transactions.<sup>181</sup>

The main difference between owning a tangible good and leasing a tangible good is illustrated by the product being sold, the type of payment, and the length of use.<sup>182</sup> With these factors, any real world sale or intangible digital sale can be distinguished between ownership and lease.<sup>183</sup>

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171. *Id.* at 10.

172. *See supra* Parts III-IV.

173. *See generally UsedSoft GmbH*, 2012 E.C.R.

174. *See id.* at para. 85-88.

175. *Id.* at para. 8, 84.

176. *Daugherty v. Comm'r*, 63 F.2d 77, 79 (9th Cir. 1933). *See Lucas v. Earl*, 281 U.S. 111, 115 (1930) ("tax could not be escaped by anticipatory arrangements" no matter how skillfully devised or crafted a contract). *See also Luce v. Burnet*, 55 F.2d 751, 752 (D.C. Cir. 1932).

177. *Reese, supra* note 2, at 645-46.

178. *See id.*; *see supra* Part I.

179. *See generally UsedSoft GmbH*, 2012 E.C.R.

180. *See Reese, supra* note 2, at 645-46.

181. *See supra* Part I.

182. *See UsedSoft GmbH*, 2012 E.C.R. at para. 8.

183. *Id.* at para. 101(1).

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### B. *The First Sale Doctrine Policy Rationale*

Adopting a multi-factor test to determine if sales are in fact leases or transfers of ownership allows the first sale doctrine to alleviate problems of the current legal structure.<sup>184</sup> In the digital realm, the first sale doctrine would allow products to be more affordable to the public and help to ensure that works of authorship remain available to the public over time.<sup>185</sup> The right to transfer is vital for efficiency because it ensures that property is devoted to its most valuable use.<sup>186</sup>

From its inception,<sup>187</sup> the first sale doctrine's goal was to limit the statutorily created monopolies granted to copyright owners.<sup>188</sup> Today, the first sale doctrine promotes access to knowledge by preserving physical works that would otherwise be discarded, abandoned, or destroyed to ensure lower market supply and higher economic gains by sellers.<sup>189</sup> An average book has a print life within twelve months of initial release<sup>190</sup> and software has an even shorter retail life.<sup>191</sup> The first sale doctrine allows these works to not only survive past their shelf life, but also to thrive.<sup>192</sup>

As stated above, ownership is the main requirement to enact the first sale doctrine.<sup>193</sup> Since the current practices under contracts of adhesion prevent the transfer of ownership, the first sale doctrine cannot be introduced as a defense.<sup>194</sup> This is in stark contrast to the congressional history of the first sale doctrine, favoring copyright to coincide with first sale and, even more, Congress' recent enactment of the essential step defense that gives digital works greater protection under the first sale doctrine.<sup>195</sup>

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184. *See supra* Part I.

185. Reese, *supra* note 2, at 577, 644, 652.

186. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32 (6th ed. 2003) (argues that the right to transfer furthers efficiency); Jeremy Waldron, *Property Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 9, 13 (Dennis Patterson ed., 2d ed. 2010) (1996) (arguing the right to transfer allows the self-perpetuation of the system of private property); SPRANKLING & COLETTA, *supra* note 111, at 27.

187. Reese, *supra* note 2, at 585.

188. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 349-51 (1908).

189. Reese, *supra* note 2, at 584-610.

190. Brief of Amici Curiae American Library Ass'n et al. in Support of Plaintiff and Affirmance, *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (No. 09-35969), available at <https://www.eff.org/node/57024>.

191. Pamela Brannon, *Reforming Copyright to Foster Innovation: Providing Access to Orphaned Works*, 14 J. INTELL. PROP. L. 145, 154-55 (2006).

192. Reese, *supra* note 2, at 584. *See* Brannon, *supra* note 191, at 147-48, 154-55.

193. *See supra* Part IV.

194. *See supra* Parts III-IV.

195. *See supra* Part II.

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## VI. CONCLUSION

Today's digital property transactions resemble a feudal system in which the digital copyright owner is able to dictate the terms and overall use of the property to the end user through use of contracts of adhesion.<sup>196</sup> The United States needs a unified scheme to replace the current copyright and contract system that protects not only distributors, but end users as well, and that takes into account all of digital property's unique features and facets.<sup>197</sup> U.S. courts should treat digital property as such and prevent contracts of adhesion from disenfranchising consumers from ownership.<sup>198</sup>

The most viable avenue for achieving this goal is to introduce the first sale doctrine into digital property transactions that resemble real world sales, thereby permitting items that were previously protected under the first sale doctrine to remain protected.<sup>199</sup>

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196. *See supra* Part III.

197. *See Yeh, supra* note 5, at 355-56.

198. *See supra* Part III.

199. *See supra* Parts IV-V.